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No. 06-1543

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IN THE

Supreme Court of the United States

Bounpone B. Sasouvong,
Petitioner,

v.

Washington,
Respondent.

On Petition for Writ of Certiorari
to the Washington Court of Appeals, Division I

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

REPLY BRIEF FOR PETITIONER 1

CONCLUSION 4

TABLE OF AUTHORITIES

Cases:

Apprendi v. New Jersey, 530 U.S. 466 (2000) 1

Blakely v. Washington, 542 U.S. 296 (2004) 2, 3, 4

Boykin v. Alabama, 395 U.S. 238 (1969) 3

State v. Harris, 118 P.3d 236 (Or. 2005) 4

State v. Meade, 120 P.3d 975 (Wash. App. 2005) 2

State v. Schaaf, 743 P.2d 240 (Wash. 1987) 2

State v. Tai N., 113 P.3d 19 (Wash. App. 2005) 2

Rules:

Wash. R. App. P 2.5(a) 3

Wash. Rev. Code § 13.04 2

REPLY BRIEF FOR PETITIONER

The State does not dispute the importance of the question whether the Sixth and Fourteenth Amendments permit a court to enhance a criminal defendant's sentence based on a prior juvenile adjudication that he never had a right to contest before a jury. Nor does the State dispute that federal courts of appeals and state courts of last resort are intractably divided over the issue. The State does not even seriously respond to petitioner's explanation as to why the Washington Supreme Court majority's resolution of this issue is incorrect. *See* Pet. for Cert. 17-21.

Instead, the State advances three minor, formalistic grounds for denying review. As petitioner now demonstrates, none detracts from the need for this Court to resolve the constitutional question presented or its ability to do so in this case.

1. The State asserts that the conflict over the question presented turns to some extent over differences in state law. Some states, the State suggests, preclude juvenile adjudications obtained without the possibility of a jury from being considered "convictions," whereas others do not. BIO 8-9. None of the six federal courts of appeals or five state courts of last resort to address the question presented has ever advanced this proposition. And for good reason. The question whether a prior juvenile adjudication that the defendant did not have the opportunity to challenge before a jury constitutes a "conviction" for purposes of the *Almendarez-Torres* exception to the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is obviously one of federal law. It does not, and cannot, turn in any way on how a state "labels" juvenile adjudications for purposes of a state-law sentence enhancement provision. *Apprendi*, 530 U.S. at 494.

Furthermore, to the extent the State suggests that substantive Washington law with respect to juvenile adjudications is materially different from Louisiana's or Oregon's, BIO 5-6, 8-9, the State simply misrepresents Washington

law. The Washington Constitution, just like the Louisiana Constitution (*see* BIO 8), requires all "criminal prosecutions" to be subject to jury trial. Wash. Const. art. I, sec. 22. And the Washington Supreme Court, just like the Oregon Supreme Court (*see* BIO 8), has made it perfectly clear that "[u]nder the juvenile code, a court order adjudging a juvenile a delinquent 'shall in no case be deemed a conviction of a crime.'" *State v. Schaaf*, 743 P.2d 240, 243 (Wash. 1987) (quoting Wash. Rev. Code § 13.04.240). Accordingly, the Washington courts have held over and over – each time at the State's urging – that because "[j]uvenile proceedings [are] rehabilitative in nature and distinguishable from adult criminal prosecutions," juveniles need not be afforded the right to jury trial under Washington law or the Sixth Amendment. *Schaaf*, 743 P.2d at 242; *accord State v. Meade*, 120 P.3d 975, 978-79 (Wash. App. 2005); *State v. Tai N.*, 113 P.3d 19, 22 (Wash. App. 2005). The only way for the State to get around these holdings here would be for it to dismantle its current juvenile justice system.

2. The State argues that this case is a problematic vehicle for resolving the question presented because the record lacks copies of documents purporting to show that petitioner pleaded guilty to the prior juvenile offenses the trial court used to enhance his sentence. BIO 9-10. The State is wrong. As the Washington Court of Appeals made clear, copies of actual judgments reflecting juvenile adjudications are unnecessary under Washington law to enhance a defendant's sentence. BIO App. 19a. So the question whether Washington's procedures for enhancing sentences based on juvenile adjudications comport with the Sixth Amendment is squarely presented.

Insofar as the State further argues that these documents would show that petitioner "waived any jury trial right he argues that he should have had," BIO 10, the State is mistaken. This Court observed in passing in *Blakely v. Washington*, 542 U.S. 296, 310 (2004), that defendants are

free to "stipulate[] to the relevant facts" with respect to a sentence enhancement. But nothing in that observation altered the longstanding rule that any waiver of the right to jury trial must be "an intentional relinquishment or abandonment of a known right." *Boykin v. Alabama*, 395 U.S. 238, 242-43 & n.5 (1969). When petitioner allegedly pleaded guilty to his juvenile offenses at issue here, he did not have the right to a jury trial, so he obviously could not then have waived that right. Likewise, while petitioner declined in the trial court here to challenge the accuracy of the State's representation that he had a juvenile record, he never renounced the argument that the Washington procedures that allow judges instead of juries to find these sentence-enhancing facts violate the Sixth and Fourteenth Amendments.[1] Indeed, after the trial court entered judgment, petitioner properly raised that constitutional argument in the Washington Court of Appeals, which rejected it on the merits. Pet. App. 1a; *see* Wash. R. App. P. 2.5(a) (constitutional arguments may be raised for first time on appeal). That is all that is necessary for purposes of his continuing to press that contention in this Court.

3. Finally, the State asserts that this Court lacks jurisdiction to consider holding – as the Oregon Supreme Court has – that the Sixth Amendment requires allowing a defendant to dispute the existence of sentence-enhancing prior juvenile adjudications, but not the alleged conduct underlying those adjudications, before a jury. BIO 11-12.

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[1] To be clear, petitioner "admitted" (BIO 10) in the trial court *only as a matter of Washington law* that his prior juvenile adjudications counted toward his offender score. He never conceded that the alleged adjudications could be so counted consistent with federal constitutional law. Nor did petitioner ever "stipulate" (BIO 10) to the accuracy of the purported adjudications. (And even if he had so stipulated, it still would not matter. The right to trial by jury applies even when the prosecution's allegations are undisputed, for juries have the power to return verdicts declining to impose sentence enhancements even when the facts support such enhancements. *See* Pet. for Cert. 15-16, 19-20.)

This proposition is specious. Petitioner submitted the Oregon Supreme Court's decision in *State v. Harris*, 118 P.3d 236 (Or. 2005), to the Washington Court of Appeals in a statement of additional authority filed on September 8, 2005. The decision is effectively a "lesser included" version of the argument petitioner has consistently advanced – namely, that the Sixth Amendment prohibits a court from enhancing a defendant's sentence on the basis of juvenile adjudications unless a jury finds that the defendant actually commited the wrongful behavior underlying the adjudication. Accordingly, there cannot be any doubt that this Court has jurisdiction to consider both these variations of exactly what the Sixth Amendment requires here.

* * *

The issue whether a criminal defendant's sentence may be enhanced based on a prior juvenile adjudication that he never had a right to contest before a jury is not going to go away. It is extremely important. And lower court decisions such as the Washington Supreme Court's that governed here strip defendants of a constitutional guarantee that is vital to our system of popular "control in the judiciary." *Blakely*, 542 U.S. at 306. This Court should settle this matter.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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